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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. [redacted] 972

MELVILLE CONFECTIONS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE BLAKELY PRINTING COMPANY, CHICAGO

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on January 29, 1964.

CITATIONS TO THE OPINIONS BELOW

The opinion of the Court of Appeals has not been published in the Reports. The opinion of the Court of Appeals appears in the Appendix to this Petition.

STATUTES INVOLVED

The statutory provisions involved are Sections 157, 158 (a)(1), (3) and 160(c) of U. S. C., Title 29.

JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1964. Rehearing was denied on March 3, 1964. Jurisdiction of this Court is involved under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED

A. Does Section 8(a)(1) of the Labor-Management Relations Act of 1947 require a showing that an employer has interfered with employees engaged in the exercise of rights guaranteed by Section 7 of the Act?

B. Can the ban of Section 10(b) of the Labor-Management Relations Act of 1947 be avoided by invoking the doctrine of continuing violation when the finding of violation is founded on events preceding the 10(b) period?

STATEMENT

The petitioner established a profit-sharing plan in 1958. Article III, Section 9, of the plan defined an eligible employee as "a regular, full-time employee of the Company, not represented by a Union designated as the bargaining agent for the employee." Article IV, Section 4, of the Plan gave the Committee the duty and authority "to determine all questions of eligibility, the status and rights of participants, beneficiaries, distributees and other persons." Article V of the Plan made an eligible employee a participant in the Plan after twelve months of continuous service with the company and he continued as such until death, disability, retirement or severance of employment. The petitioner issued a Statement of Company Policies which includes an erroneous reference to the profit-sharing plan as stating that an individual cannot be represented by any union or other outside bargaining agent in order to share in any benefits for that year (fiscal year) but also referred the employee to the plan and to the plan's administrative committee.

In July of 1960 an election was held to which the union filed objections. The election was set aside because the petitioner's president made a speech in which the Board found a threat to deprive employees of benefits under the profit-sharing plan should they select a union. A second election was held on October 11, 1960, and the union filed no objections. A third election was held on January 23, 1962 and was set aside by the Board because the eligibility provision of the profit-sharing plan and the conduct of the employer relating thereto tended to inhibit the employees' freedom of choice. A new election was ordered by the Board on September 6, 1962.

On September 18, 1962 the union filed a charge that the petitioner was in violation of Section 8(a)(1) of the Act by maintaining and continuing to maintain its profit-sharing plan with the eligibility language since March 19, 1962. Complaint was issued and hearing was had before a Trial Examiner at which no evidence was presented that the Committee had denied eligibility to any employee on account of union activity. The Board simply introduced the record of the July, 1960 and January, 1962 elections and the Statement of Company Policies. The Petitioner introduced its Plan. On April 12, 1963 the Examiner issued an Intermediate Report in which he found that the petitioner had violated Section 8(a)(1) in maintaining the plan with the eligibility language, in maintaining the Statement of Company Policies with its reference to the plan, and ordered petitioner to amend the plan and the Statement of Company Policies. The National Labor Relations Board affirmed on June 20, 1963 but modified the order to restrain the petitioner from "conditioning participation in any profit-sharing plan to employees who are not represented by any labor organization for collective bargaining purposes."

Petitioner filed a petition for review of the Board's order with the Seventh Circuit Court of Appeals under Section 160(f), Title 29, U. S. C. The National Labor Relations Board filed a cross petition for enforcement. The Court of Appeals for the Seventh Circuit enforced the order of the Board.

REASONS FOR GRANTING THE WRIT

The holding of the court of appeals misconceives the scope of this Court's decision in *Radio Officers' Union* v. *N. L. R. B.*, 347 U. S. 47, and is contrary to the decisions of this Court in *Local 357, Teamsters* v. *N. L. R. B.*, 365 U. S. 667; *Local Lodge 1424* v. *N. L. R. B.*, 362 U. S. 411, and *N. L. R. B.* v. *Erie Resistor Corporation*, 373 U. S. 221. The holding of the Court of Appeals is contrary to decisions of the courts of appeal for the Fifth, Eighth and Ninth Circuits. The holding of the court of appeals raises a question of great importance to the future administration of the Act.

1. The first question is whether there must be a showing that an employer has interfered with employees engaged in the exercise of rights under Section 7 in order to establish a violation of Section 8(a)(1).[1] The fact that this record shows no such affirmative action by the petitioner is summarily disposed of by the court of appeals which reached a conclusion of interference without any support in the record (App. p. 36). The court of appeals supports its conclusion that petitioner was guilty of a *per se* violation of Section 8(a)(1) by reference to its decision in *N. L. R. B.* v. *Illinois Tool Works*, 153 F. 2d 811, in which the employer was found to have laid off an employee and promulgated an unlawful no-solicitation rule in the context of union activity in violation of Section 8(a)(1). The Court also cites its decision in *Time-O-Matic, Inc.* v. *N. L. R. B.*, 264 F. 2d 96, in which the employer made threatening statements and issued an

1. The Trial Examiner found that no allegation of discriminatory conduct appears in the complaint and no evidence of discriminatory conduct in the period described appears in the record (App. p. 23).

unlawful no-solicitation rule in the context of union activity and was found to have violated Section 8(a)(1). In both cases the Court found interference by the employer with employees' rights in the context of union activity and attributed intent based on those affirmative acts. The court of appeals relies on this Court's decision in *Radio Officers' Union* v. *N. L. R. B.*, 347 U. S. 47, to establish a *per se* violation (App. p. 35). This Court then had before it the necessity of resolution of conflict between the courts of appeals in the interpretation of Section 8(a)(3), and not Section 8(a)(1). This Court also found that the employer discriminated at the instigation of the union. Under these circumstances, specific proof of intent was unnecessary since the employer conduct inherently encouraged or discouraged union membership. The violation then arose out of employer conduct in the context of union activity. Neither of these elements is present in this case. An 8(a)(3) violation is not present in this case and yet the court of appeals applies standards derived from an entirely dissimilar factual and legal situation to its decision herein. When an employer offered super-seniority in a strike situation, this Court considered Sections 8(a)(1) (App. p. 11), 8(a)(3) (App. p. 11) and 13 of the Act in reaching its decision in *N. L. R. B.* v. *Erie Resistor Corporation*, 373 U. S. 221. It defined 8(a)(1) as protecting the rights of employees to engage in concerted activities from employer interference and 8(a)(3) as making it unlawful for an employer by discrimination in terms of employment to discourage "membership in any labor organization," and cited *Radio Officers* in support of its definition of 8(a)(3). It concluded that the conduct of the employer was inherently discriminatory in its effect upon the employees' strike rights. Once again, a finding of violation is founded on

specific employer conduct in the context of the exercise of rights guaranteed by the Act.[2]

The answer to the question raised in this portion of the argument is found in the conclusion of this Court in *Local 357, Teamsters* v. *N. L. R. B.*, 365 U. S. 667, 676, that "the only encouragement or discouragement of union membership banned by the Act is that which is accomplished by discrimination" and "where, as here, Congress has aimed its sanctions at specific discriminatory practice, the Board cannot go further and establish a broader, more pervasive regulatory scheme."[3]

II. The second issue is whether the ban of Section 10(b) (App. p. 11) of the Act permits the finding of a violation founded on events predating the 10(b) period. The court of appeals concludes that "the conduct here involved was continuous from the inception of the profit-sharing plan" (App. p. 36) and that the proscribed conduct continued through the 10(b) period thus avoiding any question of the application of the 10(b) ban. In *Local Lodge No. 1424* v. *N. L. R. B.*, 362 U. S. 411, 422 which is not cited by the court of appeals in support of its conclusion of a continuing violation, this Court concluded that "we need not go beyond saying that a finding of a violation which is inescapably founded on events predating the limitations period is directly at odds with the purposes of the Section 10(b) proviso" and that "the applicability of these principles cannot be avoided here by invoking the doctrine of continuing violation." The court of appeals has nevertheless in-

2. Board decisions are also founded on specific employer conduct in the context of the exercise of rights guaranteed by the act. See *Teffenetti Restaurant, Inc.*, 136 N. L. R. B. 1156; *Jim O'Donnell, Inc.*, 123 N. L. R. B. 1639, 1647 which was relied upon by the Trial Examiner (App. p. 19).

3. See also *Wayside Press* v. *N. L. R. B.*, 206 F. 2d 862, 864, 9th C. C. A.; *N. L. R. B.* v. *Burnup & Sims, Inc.*, 5th C. C. A., 322 F. 2d 57, 60; *Hendrix Mfg. Co.* v. *N. L. R. B.*, 5th C. C. A., 321 F. 2d 100, 105.

voked the doctrine of continuing violation to support a finding of an 8(a)(1) violation against petitioner.[4] As a result, no evidence of unlawful conduct in enforcement of the provisions of the plan during the 10(b) period is necessary, and the petitioner is guilty of interfering with employee rights in doing nothing (*N. L. R. B.* v. *Brown*, 310 F. 2d 539, 546, 9th C. C. A.).[5] The examiner's findings and conclusions with respect to the conduct of the petitioner prior to the 10(b) period are therefore not relied upon by him as a basis for the current violation but were received by him to bring into focus the conduct which is involved in the complaint (App. pp. 20, 21). Even if there is no evidence within the six-month period on which to base a finding of violation, the court of appeals is content to rely on the doctrine of continuing violation as establishing the violation within the six-month period (App. p. 36). The court of appeals thus assumes, without finding, that the plan was unlawful in its inception and finds that petitioner violates the Act by doing nothing in the 10(b) period, and its decision is squarely within the conclusion of this Court in *Local Lodge 1424* when this Court said:[6]

> "In any real sense, then, the complaint in this case is 'based upon' the unlawful execution of the agreement, for its enforcement, though continuing, is a continuing violation solely by reason of circumstances existing at the date of execution. To justify reliance on those circumstances on the ground that the maintenance in effect of the agreement is a continuing violation is to support a lifting of the limitations bar by a charac-

4. In *N. L. R. B.* v. *Transamerican Freight Lines*, 275 F. 2d 311, 314, on the contrary, the Seventh Circuit answered a defense of Section 10(b) by concluding that the Board based its finding not on the pre 10(b) inquiry as to union affiliation but on the use made of the information in the 10(b) period, a fact situation which is not present here.

5. *Herbert D. Young*, 127 N. L. R. B. 1101, 1102, 1109.

6. *Local Lodge 1424*, 362 U. S. 411, 423; *N. L. R. B.* v. *Trans-American Freight Lines*, *supra*.

terization which becomes apt only when that bar has already been lifted."

In so doing the court of appeals accepts the contention of the General Counsel that the Plan was illegal on its face and from its inception (App. p. 20) and the conclusion of the Trial Examiner to the same effect (App. p. 21) based upon his rejection of the application of Local Lodge No. 1424 to this case (App. p. 21). On the contrary, it is clear that Section 10(b) of the Act precludes a finding of violation here because it is based solely on events (the elections and the establishment of the Plan or the establishment of the Plan itself) which occurred more than six months before September 18, 1962, the date upon which the charge herein was filed.[7] It is also clear that the Court cannot avoid the strictures of Section 10(b) by characterizing petitioner's plan as a *per se* violation of the Act during the 10(b) period (App. p. 35; Petition for Rehearing, App. pp. 38-41).[8]

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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7. *Herbert D. Young, supra.*

8. It should be noted that the Trial Examiner does not so characterize petitioner's plan (App. p. 21).

APPENDIX.

STATUTES INVOLVED:

United States Code, Title 29—Labor:

Section 157:

"Employees shall have the right to self-organization, to form, join or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and shall also have the right to refrain from any or all such activities."

Section 158(a):

"It shall be an unfair labor practice for an employer (1) to interfere with, restrain or coerce employees in the exercise of rights guaranteed in Section 157 of this title;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

Section 160(b):

"Whenever it is charged that any person has engaged in or is engaging in any such unfair practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after serving of said complaint. *Provided*,

that no complaint shall issue upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of the copy thereof upon the person against whom such charge is made.

UNITED STATES OF AMERICA.

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

Division of Trial Examiners.

Washington, D. C.

Melville Confections, Inc. and Local 329, United Service Employees Union, affiliated with Building Service Employees Union, AFL-CIO.	Case No. 13-CA-5142

John R. Phillips, Esq., and Edward T. Maslanka, Esq., for the General Comsel. Frederick W. Turner, Jr., Esq., and Murray B. Woolley, Esq (Turner, Hunt and Woolley, Esqs.), of Chicago, Ill., for the Respondent. Sidney Lens, Director, of Chicago, Ill., for the Charging Party.

Before: Leo F. Lightner, Trial Examiner.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This proceeding was heard before the undersigned Trial Examiner in Chicago, Illinois, on January 28, 1963, on the complaint of the General Counsel and the answer of Melville Confections, Inc., herein referred to as the Respondent.[1] The issue litigated was whether the Respondent engaged in unfair labor practices and thereby violated Section 8(a)(1) of the Labor Management Relations Act, 1947, as amended, 61 Stat. 136, hereinafter called the Act. The parties waived oral argument and briefs filed by the General Counsel and Respondent have been carefully considered. During the hearing the Trial Examiner reserved rulings on the materiality and relevance of certain exhibits. These rulings are disposed of in accordance with findings and conclusions herein set forth.

Upon the entire record and from my observation of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

I. The Business of the Respondent

Respondent is an Illinois corporation, having its principal office and place of business at Melrose Park, Illinois, engaging in the manufacture of candy. During the 12-month period preceding the issuance of the complaint, on November 9, 1962, a representative period, Respondent has done a gross volume of business in excess of $50,000.

1: The charge herein was filed on September 18, 1962, and a complaint was issued on November 9, 1962.

During the same period Respondent purchased and received goods and materials in excess of $50,000 from places outside the State of Illinois. The complaint alleges, the answer admits, and I find, that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved.

Local 329, United Service Employees Union, affiliated with Building Service Employees Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices.

The Issue.

The principal issue raised by the pleadings and litigated at the hearing is whether the Respondent since on or about March 19, 1962, and continuing at all times thereafter, interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act, by maintaining and continuing to maintain a profit sharing plan for its employees which requires as a condition precedent to participation in the plan and its benefits, that employees forego representation by the Union, or other labor organization, for purposes of collective bargaining, thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

Profit Sharing Plan—Statement of Company Policies.

There is no dispute relative to the background evidentiary facts. On June 30, 1958, Respondent entered into a profit-sharing plan agreement with Continental Illinois National Bank and Trust Company of Chicago, as trustee, establishing a deferred profit-sharing plan for eligible

employees," effective as of July 1, 1957. The plan is known as "Melville Confections, Inc. Profit-Sharing Plan." This is a profit-sharing plan in which contributions are made only by the Respondent.[2]

The plan provides, *inter alia*:

> Article III. (9) Defines "eligible employee" as "a regular full-time employee of the Company, not represented by a Union designated as the bargaining agent for the employee."
>
> Article III. (10) Defines "participant" as "an eligible employee who has satisfied the requirements set forth in Article V hereof."
>
> Article V provides for "participation" as follows: "Each eligible employee, who, on the effective date, shall have completed twelve (12) months of continuous service shall become a participant as of the effective date. Each eligible employee who shall not have completed twelve (12) months of continuous service on the effective date shall thereafter become a participant as of the first anniversary date on which he shall have completed twelve (12) months of continuous service. A participant shall continue as such until the date on which an event shall occur (death, disability, retirement or severance of employment) which, under Articles VIII, IX, X or XI of this agreement shall entitle such participant or his beneficiary, to receive a distribution from the Trust Fund, whereupon such participant, or his beneficiary, shall become a distributee as defined in Article III of this agreement; *provided, however*, for the purposes of Section 2, 3 and 4 of Article VII and Section 5 of Article XII, an eligible employee who is a participant on the last business day of any fiscal year shall be deemed to have been a participant on the last day of such fiscal year."
>
> Article XV "terminations" provides in part: "This Trust and the profit sharing plan of which it forms a part may be terminated by the Company at any time,

2. However, provision is made for voluntary contributions by participants.

by giving thirty (30) days' prior notice in writing to the Trustee and to the Committee."

A "first amendment", dated September 25, 1958, contains no modification of the sections set forth.

The term "anniversary date" is defined as the first day of each fiscal year of the Trust subsequent to the fiscal year ended June 30, 1958. Benefits are paid to participants upon retirement at or after age 65, death, total and permanent disability, or severance of the employment relationship for whatever cause, or to the beneficiary of the participant upon the latter's death. The amount which will be paid to a participant or his beneficiary depends, among other things, upon the length of service of the participant, pursuant to a formula prescribed in the plan, and modified in the amendment.

A "Statement of Company Policies," effective May 1, 1961, includes Item 40 "profit sharing," which in part provides:

> Under the terms of the plan, an individual must be a full-time employee and have had at least one year seniority prior to the start of any fiscal year, and cannot be represented by any union or other outside bargaining agent, in order to share in any benefits for that year. This plan was established voluntarily by the company and the company reserves the right to discontinue it at any time.

The parties stipulated, and, I find that the provisions of the Plan applicable to employee eligibility and participation, as originally set forth in the Profit-Sharing Trust Agreement of 1957, and the booklet "Statement of Company Policies," have remained unchanged since the plan's inception and are presently in effect. It is also undisputed, and I find that the booklet, "Statement of Company Policies," has been distributed to employees during the period beginning July 1957 and continuing to the date of the hearing, January 28, 1963.

Events Related to July 1960 Election.

Pursuant to an agreement for consent election, an election was held on July 18, 1960.[3] The Union filed objections to conduct affecting the results of election. The Regional Director found, *inter alia*, that during a speech on July 16, 1960, the president of the employer stated as follows:

> This profit-sharing plan was approved by the United States Government and I want to read one clause without comment. It deals with the employees who are eligible to participate in the profit-sharing plan, and the plan reads *and I quote*:
>
> "All full-time workers are eligible to participate in this plan provided they are not a union member or represented by any other bargaining agent."

The Regional Director concluded:

> It is the clear and unmistakable import of the quoted phrase from the speech of July 16, 1960, that should the employees select a union to represent them as bargaining agent they would no longer be eligible to participate in the profit-sharing plan and would thereby lose the benefits derived from the said plan. Such threat of loss of economic benefit is, in the opinion of the undersigned, sufficient basis for setting aside the election.

A second election was held on October 11, 1960, to which the Charging Party filed no objections.

Events Relative to the Election of January 23, 1962.

Pursuant to a stipulation for certification upon consent election, an election was held on January 23, 1962.[4] The Regional Director's Report on Objections recommended that the Charging Party's objections based on the eligibility language in the "Statement of Company Policies" booklet be sustained. On September 6, 1962, upon consideration

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3. Case No. 13-RC-7259.

4. Case No. 13-RC-8308.

of exceptions, the Board ordered the election set aside. The Board found that the eligibility provision of the profit-sharing plan and the conduct of the employer relating thereto tended to inhibit the employees freedom of choice, and therefore interfered with the election.

Contentions of the Parties—Concluding Findings.

General Counsel contends that by maintaining and continuing to maintain a profit sharing plan for its employees, on and after March 19, 1962,[5] which requires as a condition precedent to participation in the plan and its benefits that employees forego representation by the Union, or other labor organization, for purposes of collective bargaining, Respondent has engaged in conduct constituting interference, restraint and coercion of employees in the exercise of rights guaranteed in Section 7. General Counsel urges that the kind of eligibility provisions Respondent executed as a part of its profit sharing trust agreement in 1957, and made known to its employees at all times thereafter through the vehicle of its booklet "Statement of Company Policies," inherently infringes upon basic Section 7 guarantees and foreseeably discourages union membership.

It is patent that the "plan" restricts "participation" to "eligible employees." The term "eligible employees" by definition excludes those employees "represented by a union designated as the bargaining agent for the employee." That the employees were advised of the continuation of the plan and its restrictions, through the distribution of the "Statement of Company Policies," during the Section 10(b) period, is undisputed.

The Board has found the mere maintenance and continuance of a provision in a Pension Trust Plan making non-union representation one of the qualifications for eligibility

5. See footnote 1.

to participate therein, itself, tends to interfere with, restrain, and coerce employees, who are otherwise eligible, in the exercise of their self-organizational rights guaranteed in Section 7 of the Act. *Jim O'Donnell, Inc.*, 123 NLRB 1639, 1643.[6]

In *General Motors Corporation*, 59 NLRB 1143, the Board found that salaried employees were transferred to hourly employees by reason of company policy providing for such a transfer for employees who had designated a collective-bargaining representative. As a result the employees in the bargaining unit were deprived of certain benefits and contingent benefits, including ineligibility to participate in a retirement plan. The Board held that unilateral changes in employment status made by an employer based on the exercise of the right to act collectively, are repugnant to the basic purposes of the Act, are *per se* at variance with the interdiction in Section 8(a)(3), against discrimination in regard to hire, tenure and conditions of employment, and an inevitable deterrent to, and interference with the exercise of the right to self-organization guaranteed in Section 7. (59 NLRB at p. 1155.)

An employer who contributed money to a union's welfare trust fund and pension trust fund for the benefit of employee members, without making comparable provisions for nonmember employees, has been found to have engaged in discriminatory conduct in violation of Section 8(a)(3) and (1) of the Act. *Northeast Coastal, Inc.*, 124 NLRB 441, 442.

Warning an employee that, if the Union got in, the employees "will probably lose the profit-sharing" plan, without further explanation, has been found to constitute a threat, and conduct in derogation of Section 8(a)(1). *Elias Brothers Big Boy, Inc.*, 139 NLRB No. 99.

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[6] Cf. *Toffenetti Restaurant Company, Inc.*, 136 N. L. R. B. 1156, enfd. 51 L. R. R. M. 2601.

Under the circumstances herein, I find no independent evidence of animus or specific intent to abrogate rights guaranteed by the Act is necessary to support a finding of violation. In the *Radio Officers'* case the Supreme Court said:

> This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct. . . . Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage [or discourage] is sufficiently established.[7]

General Counsel further urges that the Plan is illegal on its face, that while executed in 1957, it has at all times to date remained in full force and effect; and the booklet explaining the Plan to employees continues to be distributed, thus a continuing violation exists. In the *Gaynor News*[8] case the court held that so long as the contract continued in force, if actually illegal, a continuing offense was being committed by the employer.

Respondent contends that a careful reading of the pertinent provisions of the entire Plan fails to reveal the discrimination charged in the complaint. I find no merit in this contention. No ambiguity in the limitation of benefits to "eligible employees," as defined, appears. Nor do I find merit in Respondents' contentions that the statement of Company Policies is an inaccurate or incomplete statement of the Plan. While I have found unnecessary proof of

7. *Radio Officers Union etc. v. N. L. R. B.*, 347 U. S. 17, 45.
8. *N. L. R. B. v. Gaynor News Co.*, 179 F. 2d 719, 722.

animus or specific intent. Respondent's conduct in the pre-six month period in reference to the Plan has resulted in two elections being set aside. This evidence has been received only for the purpose of giving color, or bringing into clear focus, the conduct which is the gravamen of the complaint.

Respondent, in effect, urges that in the *Local No. 1424*[9] case the Supreme Court barred a finding of a violation where "the evidence in fact marshalled from within the six-month period is not substantial and the merit of the allegations in the complaint is shown largely by reliance on the earlier events." Suffice it to say, in the *Local 1424* case, the Court treated with a contract lawful on its face and in its enforcement, but unlawful when made in a barred period. I find this case, and others cited by Respondent, inapposite.

Respondent asserts that the plan was approved by the Treasury Department. Thus one agency of the Government has approved that which another agency says is a violation of the Act. I find no merit in this contention. The jurisdiction of the Treasury Department is related to questions concerning the requirements of tax laws. Its rulings do not purport to encompass or apply the restrictions of the National Labor Relations Act.

I have found that the plan, with its unlawful restriction, and the distribution of the booklet advising employees of the restriction, continued throughout the period commencing 6 months prior to the filing of the charge herein. Accordingly, I find that by maintaining and continuing to maintain a profit sharing plan with the unlawful conditions set forth the Respondent has interfered with, restrained and coerced its employees in the exercise of their right

[9] *Local Lodge No. 1424 v. N. L. R. B. (Bryan Manufacturing Co.)*, 362 U. S. 411

guaranteed in Section 7, and said conduct is in derogation of the provisions of Section 8(a)(1) of the Act.

IV. The Effect of the Unfair Labor Practice Upon Commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The Remedy.

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I have found that the Respondent has interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act, by maintaining and continuing to maintain a profit-sharing plan for its employees which limits participation to "eligible employees" and defines eligible employee as "a regular full-time employee of the Company, not represented by a Union designated as the bargaining agent for the employee." Article XVII entitled "Amendment" of the Profit-Sharing Plan provides "the Company shall have the right to amend this agreement at any time and from time to time by instrument in writing, a copy of which shall be filed with the Trustee, *provided that* no such amendment shall increase the duties or responsibilities of the Trustee without its written consent." I will accordingly recommend that Respondent be ordered to amend the profit-

sharing plan to eliminate that portion of Article III (9), which provides "not represented by a union designated as the bargaining agent for the employees." I will also recommend that Respondent be ordered to amend its booklet "Statement of Company Policies" by striking from paragraph number 10, on page 9, the following language, "and cannot be represented by any union or other outside bargaining agent, in order to share in any benefits for that year."[10] It is further recommended that Respondent be ordered to cease and desist from in any like or related manner infringing upon rights guaranteed to its employees by Section 7 of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record of the case, I make the following:

Conclusions of Law.

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 329, United Service Employees Union, affiliated with Building Service Employees Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining and continuing to maintain a profit sharing plan for its employees which requires as a condition precedent to participation in the plan and its benefits that employees forego representation by the Union, or other labor organization, for purposes of collective bargaining, Respondent has interfered with, restrained and coerced

10 General Counsel in addition, has requested that the Respondent be ordered to credit the accounts of employees for the amounts of benefits discriminatorily denied them in the 6-month period preceding the issuance of the complaint. No allegation of such discriminatory conduct appears in the complaint and no evidence of such discriminatory conduct, in the period described, appears in this record.

its employees in the exercise of their rights guaranteed in Section 7 of the Act.

4. By the foregoing conduct, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in the case, I recommend that the Respondent, Melville Confections, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Maintaining and continuing to maintain a profit-sharing plan for its employees which requires as a condition precedent to participation in the plan and its benefits that employees forego representation by the Union, or other labor organization, for purposes of collective bargaining; or so advising its employees in its booklet, "Statement of Company Policies."

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights of self organization, to form labor organizations, to join or assist Local 329, United Service Employees Union, affiliated with Building Service Employees Union, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection; or to refrain from any and all such activities, except to the extent that such rights might be affected by an agreement requiring membership in a labor organization as a condi-

tion of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Amend the profit-sharing plan in accordance with the recommendations set forth in "The remedy" herein.

(b) Amend its booklet "Statement of Company Policies" in accordance with the recommendations set forth in "The remedy" herein.

(c) Post at its plant in Melrose Park, Illinois, copies of the notice attached hereto marked "Appendix."[11] Copies of said notice to be furnished by the Regional Director for the Thirteenth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent and maintained by it for 60 consecutive days thereafter, in conspicuous places including all places where notices to employees are customarily posted, including each of Respondent's bulletin boards. Reasonable steps shall be taken by the Respondent to insure that said notice is not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Thirteenth Region, in writing, within 20 days from the date of the receipt of this Intermediate Report what steps the Respondent has taken to comply with the foregoing recommendations.

It is further recommended that unless within 20 days from the date of the receipt of this Intermediate Report,

11. In the event that these Recommendations be adopted by the Board, the words "A Decision and Order" shall be substituted for the words, "The Recommendations of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of the United States Court of Appeals, the words, "A Decree of The United States Court of Appeals Enforcing an Order" shall be substituted for the words "A Decision And Order."

the Respondent shall notify the said Regional Director in writing that it will comply with the foregoing recommendations,[12] the National Labor Relations Board issue an order requiring Respondent to take the aforesaid action.

Dated at Washington, D. C. April 12, 1963.

/s/ LEO F. LIGHTNER,
LEO F. LIGHTNER,
Trial Examiner.

12. "In the event these Recommendations be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply therewith."

APPENDIX

Notice To All Employees

Pursuant To

The Recommendations of a Trial Examiner

of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, we hereby notify our employees that:

WE WILL NOT maintain or continue to maintain a profit-sharing plan for our employees which requires, as a condition precedent to participation in the plan and its benefits that employees forego representation by the Union, or other labor organizations, for purposes of collective bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist LOCAL 329, UNITED SERVICE EMPLOYEES UNION, affiliated with BUILDING SERVICE EMPLOYEES UNION, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL amend our profit-sharing plan, known as MELVILLE CONFECTIONS, INC. PROFIT-SHARING PLAN, by eliminating from the definition of "eligible employees," in Article III(9) the words "not represented by a union designated as the bargaining agent for the employee." Said clause, accordingly, shall hereafter

define an "eligible employee" as "a regular full-time employee of the Company."

All our employees are free to become or remain or to refrain from becoming or remaining members of Local 329, United Service Employees Union, affiliated with Building Service Employees Union, AFL-CIO, or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8(a)(3) of the Act.

MELVILLE CONFECTIONS, INC.
(Employer)

By
(Representative) (Title)

Dated

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Midland Building, 176 West Adams Street, Chicago 3, Illinois (Tel. No. Central 6-9660), if they have any question concerning this notice or compliance with its provisions.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MELVILLE CONFECTIONS, INC. and LOCAL 329, UNITED SERVICE EMPLOYEES UNION, affiliated with BUILDING SERVICE EMPLOYEES UNION, AFL-CIO.	Case No. 13-CA-5142

DECISION AND ORDER

On April 12, 1963, Trial Examiner Leo F. Lightner issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief; the General Counsel filed a brief in support of the Intermediate Report.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the Trial Examiner's rulings and finds no prejudicial error. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Respondent's exceptions and the briefs, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.

ORDER

The Board adopts as its Order the "Recommendations" of the Trial Examiner, with the following modifications:

Substitute the following for paragraph 1(a) of the recommended order: "Conditioning participation in any profit-sharing plan to employees who are not represented by any labor organization for collective-bargaining purposes."

Respondent's exceptions and the briefs, and the entire of the Trial Examiner, with the following modifications:

Substitute the following for the first paragraph of the Appendix to the Intermediate Report:

> We Will Not condition the participation in any profit-sharing plan to employees who are not represented by any labor organization for collective-bargaining purposes.

Dated, Washington, D. C., June 20, 1963.

BOYD LEEDOM, *Member*

JOHN H. FANNING, *Member*

GERALD A. BROWN, *Member*

(SEAL)

NATIONAL LABOR RELATIONS BOARD.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 14252 September Term, 1963 January Session, 1964

MELVILLE CONFECTIONS, INC., *Petitioner*, v. NATIONAL LABOR RELATIONS BOARD, *Respondent*.	On Petition To Review and Cross Petition For Enforcement Of An Order Of The National Labor Relations Board.

January 29, 1964

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges*.

CASTLE, *Circuit Judge*. This case is before the Court on the petition of Melville Confections, Inc.[1] to review and set aside an order of the National Labor Relations Board issued against the company, and upon the Board's cross-petition for the enforcement of that order. The Board's decision and order are reported at 142 N.L.R.B. No. 144.

The Board found that the company violated Section 8(a)(1) of the Act[2] by maintaining and continuing to maintain

1. Hereinafter referred to as "company."

2. All references herein to the "Act" are to the National Labor Relations Act, as amended, 29 U.S.C.A. § 151 et seq. Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" them by Section 7 which includes the right of employees to form or join a labor organization and "to bargain collectively through representatives of their own choosing."

a profit-sharing plan for its employees which required as a condition precedent to participation in the plan and its benefits that the employee not be represented by a labor organization for the purposes of collective bargaining. The Board's order requires the company to cease and desist from conditioning participation in any profit-sharing plan to employees who are not represented by a labor organization for collective bargaining purposes and to cease and desist from interfering with, restraining, or coercing its employees in any like or related manner in the exercise of their rights under Section 7 of the Act. Affirmatively, the order requires the company to amend its profit-sharing plan and to amend a reference thereto in a "Statement of Company Policies" booklet accordingly, and to post designated notices.

The complaint against the company was issued on November 9, 1962, following charges filed by the Union[3] on September 18, 1962. Previous representation elections held in 1960 and 1962 had been set aside by the Board because of pre-election statements made by the employer directing attention of the employees to the non-union status required for participation in the company's profit-sharing plan and to the company's right to discontinue the plan.

The complaint charged:

> "Since on or about March 19, 1962, and continuing at all times thereafter, Respondent [the company] has interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act by maintaining and continuing to maintain a profit sharing plan for its employees which requires as a condition precedent to participation in the plan and its benefits that employees forego representation by the Union, or other labor organization, for purposes of collective bargaining."

3. Local 329, United Service Employees Union, affiliated with Building Service Employees Intnp. AFL-CIO

The company contends that the Board's finding of a Section 8(a) (3) violation is not supported by substantial evidence on the record considered as a whole—the applicable test on review under the guiding principles furnished by *Universal Camera Corp.* v. *N.L.R.B.*, 340 U. S. 474. The company urges that the plan itself does not constitute a violation of Section 8(a) (1) and that the record reveals no proof of any act by the company within the period prescribed by Section 10(b) of the Act[4] which evinces either union animus or intention on the company's part to interfere with, restrain or coerce any employee in the exercise of a Section 7 right. The company claims that the Board relied upon events (acts and conduct of the company upon which the orders setting aside the previous elections were based) occurring more than six months prior to the filing of the instant charge in making the findings and reaching the conclusion it did.

The record reveals that the company established an employee profit-sharing plan June 30, 1958, effective as of July 1, 1957. From its inception the plan has restricted participation to "eligible employees" who have completed 12 months of continuous service in the company's employ. An "eligible employee" is defined in the plan as "a regular full-time employee of the Company, not represented by a Union designated as the bargaining agent for the employee." The plan provides that it may be amended by the company at any time and may be terminated by the company upon 30 days notice. Upon termination the plan trust fund would be distributed pro-rata among present and former participating employees. Benefits are payable to participants upon severance, retirement, disability or death. The company is required to make certain contribu-

4. Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made."

tions to the plan trust fund. Provision is made for voluntary contributions by participants.

A "Statement of Company Policies" booklet distributed to employees contains a reference to the profit-sharing plan in which the following paragraph is set forth in boldface type:

> "Under the terms of the plan, an individual must be a full-time employee and have had at least one year seniority prior to the start of any fiscal year, and cannot be represented by any union or other outside bargaining agent, in order to share in any benefits for that year. This plan was established voluntarily by the company and the company reserves the right to discontinue it at any time".

At the hearing on the complaint it was stipulated that the provisions applicable to employee eligibility and participation in the profit-sharing plan as originally set forth in the trust agreement and the booklet have remained unchanged since the plan's inception and are presently in effect, and that copies of the booklet have been distributed to employees beginning July, "1957" (sic) and continuing to-date.

It is patent that the plan excludes from participation those employees "represented by a union designated as the bargaining agent for the employee". And it is clear from the stipulation that the plan was in effect and maintained during the Section 10(b) period and that during such period the employees were advised of the continuation of the plan and its restrictions through the distribution of the booklet. We agree with the Board and the trial examiner whose findings and conclusions the Board adopted, that under the facts and circumstances disclosed by the record no independent evidence of additional acts of the company, either directly establishing animus or specific intent to abrogate employee Section 7 rights, or from which such animus or intent might reasonably be inferred, was necessary to support a finding of a Section 8(a) (1) violation.

The conduct of the company in continuing to maintain the provision making union representation a disqualification for eligibility to participate in its employee profit-sharing plan benefits and continuing to bring such restriction to the attention of its employees through distribution of the booklet setting forth company policy constituted a *per se* violation of Section 8(a) (1). If was employer conduct inherently destructive of rights guaranteed by Section 7. By its inherent nature it interfered with, restrained and coerced employees in the exercise of their right to be represented for collective bargaining by a labor organization. It placed a penalty on such action—a disqualification to participate in profit-sharing benefits. It carried with it its own inherent evidence of intent—it strains credulity to ascribe some other or different intent to the provision. In *Radio Officers Union* v. *N.L.R.B.*, 347 U. S. 17, 45, it was pointed out:

> "This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct."

The rationale of *Radio Officers* was reaffirmed in *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U. S. 221, 227-228. It was applied by this Court in connection with a Section 8(a) (1) violation in *Time-O-Matic, Inc.* v. *N.L.R.B.*, 7 Cir., 264 F. 2d 96, 99, where we stated:

> "No proof of coercive intent or effect is necessary under Section 8(a) (1) of the Act, the test being 'whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.' *N.L.R.B.* v. *Illinois Tool Works*, 7 Cir., 1946, 153 F. 2d 811, 814."

Cases such as *Quality Castings Company* v. *N.L.R.B.*, 6 Cir., opinion filed December 7, 1963, ___ F. 2d ___,

and *Pittsburg-Des Moines Steel Co.* v. *N.L.R.B.*, 9 Cir., 284 F. 2d 74, relied upon by the company, are not apposite here. Here, the disqualification is based solely upon the criterion of union representation. In *Quality Castings* and *Pittsburg-Des Moines* the employee groups excluded from the benefits involved were defined by other than union membership or activity criteria—the action complained of was not clearly discriminatory on its face as being openly and avowedly directed solely at employee activity specifically protected by the Act. Other valid bases could logically be ascribed for the action. In such circumstances intent and motivation become controlling factors and independent proof of motive or intent to interfere with, restrain or coerce employees in the exercise of protected activity is requisite to establish a violation. See concurring opinion of Justice Harlan in *Local 357, International Brotherhood of Teamsters* v. *N.L.R.B.*, 365 U. S. 667, 679-680.

The conduct here involved was continuous from the inception of the profit-sharing plan. It existed during the particular Section 10(b) period here applicable. We find nothing in the examiner's findings and conclusions which indicates any reliance on conduct of the company prior to the six-month 10(b) period as a basis for the current violation he found. His reference to the fact that prior company conduct had resulted in two elections being set aside was coupled with the observation that "[t]his evidence has been received only for the purpose of giving color, or bringing into clear focus, the conduct which is the gravamen of the complaint".

The fact that the record does not disclose any instance where an employee was rejected for participation in the plan or deprived of benefits thereunder because of union representation is not of significance except to the extent that it may serve to indicate that the company's conduct in maintaining and publicizing the restriction on participa-

tion in the plan apparently succeeded in discouraging union representation of its employees—effectively interfered to coerce and restrain the employees from exercising their right to secure union representation. It was not necessary to await some such further or additional overt act of the company in order to abate its continuing patently unfair labor practice. Nor does the fact that the company's violation antedated the Section 10(b) period applicable to the instant charge preclude a finding of a violation which occurred through a continuation of the proscribed conduct during and within the six-month period prior to the filing of the charge.

We are not persuaded by the contentions of the company which we have discussed and although we have considered the remaining and subsidiary arguments advanced by the company in support of its position, and the cases cited and relied upon, we are of the view that none of them merit detailed discussion. We conclude that the findings of the examiner adopted by the Board are supported by substantial evidence on the record considered as a whole and that the conclusions reached represent the application of correct legal criteria.

The petition of the company to set aside the order of the Board is denied; the order is affirmed; and the Board's cross-petition for enforcement of the order is granted and enforcement ordered.

ENFORCEMENT ORDERED.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 14252.

MELVILLE CONFECTIONS, INC., *Petitioner*, vs. NATIONAL LABOR RELATIONS BOARD, *Respondent*.	On Petition for Review of an Order of the National Labor Relations Board.

PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

We respectfully request a rehearing and reversal of the Court's decision.

The Court has, we submit, erroneously accepted the position of the Board that petitioner's profit-sharing plan is a per se violation of Section 8(a)(1) of the Act. The Trial Examiner's findings have been given more weight "than in reason and in the light of judicial experience they deserve." (*Universal Camera Corporation* v. *N. L. R. B.*, 340 U. S. 474.) Specifically, the Examiner relied on a series of cases, all of which involved discriminatory action by the employer (*e.g. Jim O'Donnell, Inc.*, 123 N. L. R. B. 1647), while simultaneously enunciating a conclusion of a per se violation. The Court has, we submit, accepted the per se finding without substantial evidence on the record as a whole and against an intermediate report which in-

cludes proof of intent on the part of the petitioner as well as a per se conclusion.

When the Court concludes that the absence of evidence as to discrimination under the Plan establishes that the petitioner "apparently succeeded in discouraging union representation of its employees—effectively interfered to coerce and restrain the employees. . . . ", it is substituting an inference of its own which is not supportable except on a per se theory of violation and cannot constitute substantial evidence on the record as a whole. This is not the evidence on which the Board found a violation in *Jim O'Donnell*. This is not the evidence on which the Board found a violation of 8(a)(3) and 8(a)(1) in the cases cited in the Intermediate Report.

While the Court finds the Plan to be a continuing violation of Section 8(a)(1), it does not find that the Plan was unlawful in its inception except by reference to its "inherent nature" and to it being "inherently destructive." It is questionable whether the Plan was inherently unlawful in its inception in 1957 or 1958 in the absence of the concerted activity which the Board here seeks to protect (*Gaynor News*, 197 F. 2d 719, 347 U. S. 17), and the Court does not so find.

Similarly, the Court adopts the Board's addition of the booklet on company policies to the charge without reference to the fact that the booklet is not the Plan, that the complaint charges only that the continuance of the Plan with the eligibility language violates the Act and that the booklet is also not found to be unlawful in its inception. The Court also adopts the Board's approach to the Plan which is to consider only the eligibility language and not the entire Plan. (An exception is found in the Board's reference to the termination language of the Plan in its Appendix.)

Since the Court adopts the per se approach of the Board, it can and does dismiss petitioner's 10(b) argument. However, in so doing, the Court ignores the emphasis placed by the Trial Examiner and the Board on the elections. When this emphasis is coupled with the law cited by the Board, it is clear that the Board seeks to establish a continuing threat to employee rights based on petitioner's conduct in the pre 10(b) elections. This is not just placing the petitioner's conduct in focus. It is establishing it. The Court also takes no note of the record in the second representation case as contained in petitioner's brief. If it had, it would have seen that the Board set aside the election because of petitioner's conduct and the booklet and did not rule on the Plan as such. The law establishes no lesser standards for judgment in unfair practice cases than in representation cases. As a matter of fact, it is submitted that the standards of judgment in representation cases are higher and it is pointed out that the Board coupled conduct of the Petitioner and the booklet—Plan—in setting aside the election.

Finally, the Court accepts a per se approach contrary to the conclusion of the Supreme Court in *Local 357 Teamsters v. N. L. R. B.* and rejects the decisions of the Eighth and Ninth Circuits in *Ozark Dam Contractors*, 190 F. 2d 227 and *Sebastopol Apple Growers Union*, 269 F. 2d 705. The result is that Section 8(a)(1) is deemed to have been violated regardless of the totality of conduct of the Petitioner, Board and court decisions, and in the absence of evidence of union activity or membership and discriminatory action directed at such activity or membership within the 10(b) period.

Conclusion.

We respectfully submit that the Court's present opinion constitutes an improper extension of the per se theory of violation of the Labor-Management Relations Act of 1947, as amended. We suggest that the National Labor Relations Board, other Circuit Courts of Appeal and the Supreme Court of the United States have limited the application of the per se theory of violation to situations in which discriminatory action is taken in the immediate context of concerted activity and that such a situation is not present here. It is in this context, we submit, that the Courts and the Board have drawn a conclusion as to an "inherent" violation of the Act. We suggest that a charge of a Section 8(a)(1) violation involving interference, restraint and coercion cannot be equated in law with a Section 8(a)(3) violation involving encouragement or discouragement of union activity. We suggest, finally, that the scope of review permitted the Court allows a rehearing of Petitioner's request for a review herein and a reversal of the Court's decision.

Respectfully submitted,

Frederick W. Turner, Jr.,
Murray B. Woolley,
Attorneys for Melville Confections, Inc.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois,

Tuesday, March 3, 1964.

Before

Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Win G. Knoch, Circuit Judge.
Hon. Latham Castle, Circuit Judge.

MELVILLE CONFECTIONS, INC., *Petitioner.* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	Petition for Review of an Order of the National Labor Relations Board.
No. 14252	

IT IS ORDERED by the Court that the petition for rehearing of this cause filed by petitioner be, and the same is hereby, DENIED.

LIBRARY

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 972

MELVILLE CONFECTIONS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 31-37) is reported at 327 F. 2d 689. The Board's decision and order (Pet. 13-30) are reported at 142 NLRB No. 144.

JURISDICTION

The judgment of the court of appeals (Pet. 31, 37) was entered on January 29, 1964, and a petition for

rehearing was denied on March 3, 1964 (Pet. 42). The petition for a writ of certiorari was filed on April 4, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer violates Section 8(a)(1) of the National Labor Relations Act by maintaining a profit sharing plan for its employees which conditions participation upon the employees not being represented by a labor union for purposes of collective bargaining.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth in the Appendix to the petition (Pet. 11-12).

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On June 30, 1958, the Company established a "deferred profit-sharing plan for eligible employees," effective as of July 1, 1957 (S.A. 5; P.A. 1).[1] In general, contributions to the plan are made only by the Company (S.A. 5). Under the plan, distributions are made at the severance, retirement, disability, or death

[1] References to the Board's appendix, printed at the end of its brief in the court below, are designated "B.A." References to the appendix printed at the end of petitioner's brief in the court below are designated "P.A." References to petitioner's supplemental appendix are designated "S.A."

of a "participant" (P.A. 7-8). A "participant" is defined as an "eligible employee" who has completed a certain number of months of continuous service in the Company's employ (P.A. 1-2). An "eligible employee" is in turn defined as "a regular fulltime employee of the Company, not represented by a union designated as the bargaining agent for the employee" (P.A. 1-2). The plan is administered by a committee appointed by the Company's board of directors (P.A. 4-6). The Company reserves the right to terminate the plan upon 30 days notice, and upon such termination the funds in the plan are to be distributed pro rata among the present and former participating employees (B.A. 2a). The Company may amend the plan at any time (*ibid.*).

The provisions of the plan relative to employee eligibility and participation have remained unchanged since the plan's inception and are presently in effect (S.A. 7; B.A. 1a). Beginning in 1957, and continuing to the present time, the Company has distributed to its employees a booklet entitled "Statement of Company Policies" (*ibid.*). Under item 10 ("profit sharing") of this booklet, the following paragraph is printed in bold face type (P.A. 9):

> Under the terms of the plan, an individual must be a fulltime employee and have had at least 1 year seniority prior to the start of any fiscal year, and can not be represented by any union or other outside bargaining agent, in order to share in any benefits for that year. This plan was established voluntarily by the Company and the Company reserves the right to discontinue it at any time.

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon the above facts, the Board concluded (Pet. 21-22, 29) that the Company interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act by maintaining, throughout the 6-month period prior to the filing of the charge,[1] a profit sharing plan restricted by its terms to employees who were not represented by a labor union for purposes of collective bargaining. The Board's order (Pet. 24-26, 30) requires the Company to cease and desist from conditioning participation in any profit sharing plan upon the employees not being represented by a labor organization, and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights of self-organization. Affirmatively, the Company is required to amend its profit sharing plan and its booklet in accordance with the Board's order, and to post appropriate notices.

C. THE COURT OF APPEALS DECISION

The court of appeals sustained the Board's findings, and enforced its order in full (Pet. 31-37).

ARGUMENT.

The decision of the court of appeals is clearly correct, and is not in conflict with the decisions of this Court or those of any other circuit.

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[1] The unfair labor practice charge was filed on September 18, 1962, by Local 329, United Services Employees Union (Pet. 12-13).

1. Petitioner's profit-sharing plan was in terms available only to those of its employees who were not represented by a union for collective bargaining. As the court below properly held (Pet. 35), such a plan by "its inherent nature * * * interfered with, restrained and coerced employees in the exercise of their right to be represented for collective bargaining by a labor organization"; it "placed a penalty on such action—a disqualification to participate in profit-sharing benefits." Contrary to petitioner's contention (Pet. 5-7), it was not necessary to establish that petitioner was motivated by a specific intent to abridge the employees' Section 7 rights. As this Court has explained, "specific proof of intent is unnecessary where [as here] employer conduct inherently encourages or discourages union membership." *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 45. See also *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 228. Nor was it incumbent on the Board to prove that the plan in fact restrained or coerced specific employees in the exercise of their Section 7 rights. Such proof is not required where, as here, restraint or coercion is the reasonable tendency of the employer's action. *Radio Officers*, *supra*, at 51; *Hendrix Manufacturing Co.* v. *National Labor Relations Board*, 321 F. 2d 100, 105 (C.A. 5).

2. There is no substance to petitioner's contention (Pet. 7-9) that a finding of an unfair labor practice was barred by Section 10(b) of the Act. That Section prohibits any complaint based upon an unfair labor practice that occurred more than six months

prior to the filing of the charge with the Board. Since the profit sharing plan was instituted more than six months prior to the filing of the unfair labor practice charge, Section 10(b) precluded a finding that the institution of the plan was an unfair labor practice. However, since the plan on its face contained an illegal condition, its continued maintenance within six months of the filing of the charge and thereafter constituted an independent unfair labor practice which was provable without reference to events outside the limitations period imposed by Section 10(b). Accordingly, the Board could properly find that the continued maintenance of the plan constituted an unfair labor practice. *Local Lodge No. 1424 v. National Labor Relations Board*, 362 U.S. 411, is not to the contrary. There, unlike here, "[the] agreement and its enforcement [were] both perfectly lawful on the face of things"; thus, enforcement of the agreement could be found to be "a continuing *violation* solely by reason of circumstances existing only at the date of execution"—circumstances which were outside the Section 10(b) period. *Id.* at 419, 423, emphasis in original.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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